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No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,

Petitioner,

vs.

HARRIS TRUST AND SAVINGS BANK, As Trustee of the
Sperry Master Retirement Trust No. 2,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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26 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

Respondent Harris Trust and Savings Bank[1] opposes the petition for a writ of certiorari of petitioner John Hancock Mutual Life Insurance Company ("Hancock" or "Petitioner").

[1] The party to this brief, Harris Trust and Savings Bank, is acting as a party to this action only in its capacity as Trustee of the Sperry Master Retirement Trust No. 2 (and of its successor, the Unisys Master Trust) (collectively, the "Plan") and is not otherwise affected by the outcome of this litigation. The Bank of Montreal is a parent of Harris Trust and Savings Bank. Petitioner Hancock is a mutual insurance company; it does not have any parent companies or subsidiaries to list pursuant to Rule 29.1. Respondent is not aware of any other parent companies or subsidiaries to list pursuant to Rule 29.1.

As set forth in the argument below, the Second Circuit correctly concluded that certain assets held by Hancock in its general account by virtue of the group annuity contract issued to Respondent known as "GAC 50" are "plan assets" which subject Hancock to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").[2]

Summary of Argument

The decision below accords with the plain language and legislative history of ERISA with respect to the applicability of § 1101(b)(2) to general account funds.[3] Although the decision below conflicts with an earlier decision of the United States Court of Appeals for the Third Circuit, the lack of decisions by other circuit courts on this issue favors denial of the petition for a writ of certiorari in this case, in order to permit further development of the law and the emergence of a satisfactory majority view among the lower courts. Moreover, denial of the petition may permit the Third Circuit to reconsider its decision in view of the fact that the Third Circuit's decision relied primarily on the decision of the District Court in this case, which the Second Circuit reversed. Finally, because the decision of the Third Circuit did not impose any duties upon petitioner which are inconsistent with the duties imposed by the Court below, petitioner can comply with the order of the Court below without violating any order of the Third Circuit or any other federal court.

[1] For the sake of brevity, inaccuracies in Petitioner's Statement of the Case are addressed in the Argument section of this Brief.

[2] By means of a cross-petition, Respondent seeks review of two other aspects of the ruling below with respect to the applicability of ERISA to insurance general account contracts, in the event Hancock's petition is granted.

ARGUMENT

I.

THE CIRCUIT COURT CORRECTLY CONCLUDED THAT HANCOCK IS AN ERISA FIDUCIARY WITH RESPECT TO FREE FUNDS WHICH ARE NOT ASSOCIATED WITH GUARANTEED BENEFITS

GAC 50 has two parts; one arguably provides guarantees, the other, as Hancock admits, provides no guarantees. As to this second part of the Contract, which refers to the "free funds," the Circuit Court correctly observed that "[a]lthough Hancock provides guarantees with respect to one portion of the benefits derived from the contract, it does not do so at all times with respect to all the benefits derived from the other, or free funds, portion. The non-guaranteed portion is dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides." A-8 to A-9[4]. The decision of the court below is fully supported by the language and legislative history of ERISA, decisional law, and by rulings of the Department of Labor ("DOL").

A. ERISA Exempts Pension Plan Assets From Fiduciary Rules Only "To The Extent" They Support Guaranteed Benefits

ERISA defines a fiduciary as:

> [A] person is a fiduciary with respect to a plan to the extent . . .he exercises any discretionary authority or discretionary control respecting management of such plan or *exercises any authority or control respecting management or disposition of its assets* . . .

29 U.S.C. § 1002(21)(A) (emphasis added). Hancock's status as a fiduciary as to the plan's assets held in its general account turns upon whether the assets - as to which Hancock unquestionably exercises sufficient control and authority to render it a fiduciary

[4] "A-" refers to the pages of the Appendix annexed to Hancock's Petition for Writ of Certiorari filed with the Court on December 22, 1992.

- are "plan assets" under ERISA, a term not defined in the statute. See 29 U.S.C. § 1001 *et seq*.

Congress adopted a limited "safe harbor" provision in ERISA for pension fund assets held in insurance company general accounts:

> In the case of a plan to which a *guaranteed benefit policy* is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, *solely* by reason of the issuance of such policy, be deemed to include any assets of the insurer.

29 U.S.C. § 1101(b)(2) (emphasis added).[5] "Guaranteed benefit policy" is defined in the statute as "an insurance policy or contract *to the extent that* such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B) (emphasis added).

In its Petition, Hancock argues that § 1101(b)(2) exempts the *entirety* of a contract from ERISA's fiduciary strictures whenever the contract provides for *any* guaranteed benefits. Petition at 5. In enacting ERISA, however, Congress intended to make a distinction between insurance company general account contracts (or portions thereof) which truly guarantee benefits to retirees, and those, like GAC 50, which participate in the insurer's investment experience. The Second Circuit correctly held that "a contract is a guaranteed benefit policy only 'to the extent that' it provides for benefits that an insurer guarantees." A-8.

The ERISA Conference Report echoes this principle:

> If the policy guarantees basic payments but other payments may vary with, e.g., investment performance, then *the variable part of the policy and assets attributable thereto* are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

[5] A provision in the Senate Bill would have explicitly exempted *all* assets held in general accounts from ERISA's fiduciary duty provisions. *See* S.4, 93d Cong., 1st Sess. § 511 (1973), *reprinted in* 1 Legis. Hist. of ERISA at 170 (Comm.

(Footnote continued)

H. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), *reprinted* in 1974 U.S. Code Cong. & Admin. News 5038, 5077 (emphasis added) ("ERISA Conf. Rep.").

The crucial question in this case is whether, in determining if the assets invested by the Plan are "plan assets," the availability of funds for benefits is dependent upon Hancock's success or failure as an investor, rather than upon any role it may have as an insurer. Following this standard, the free funds held in GAC 50's PA Fund are clearly "plan assets."

B. The Seventh Circuit And The *Jacobson* Court Correctly Read ERISA As Protecting Contracts Like GAC 50

In *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 327 (7th Cir. 1983), the Seventh Circuit recognized that group annuity contracts such as GAC 50 can be divided into guaranteed and non-guaranteed aspects for purposes of an ERISA analysis. In *Peoria*, the Seventh Circuit concluded that the non-guaranteed portion of the contract was governed by ERISA.

Peoria involved a deposit administration fund ("DA Fund") in which pension funds were "commingled for investment purposes with the funds of other customers of the insurance company, in much the same way as investments of different investors are pooled in a mutual fund or common trust fund, in order to obtain diversification while minimizing brokerage and management costs." 698 F.2d at 322. Once an employee retired, annuities were purchased and the purchase price for such annuities was removed from the DA Fund account. No payments to beneficiaries were ever made from the DA Fund.

In such circumstances, the Seventh Circuit held that, while the funds in issue were kept in the DA Fund, the contract was in a variable accumulation phase and did not constitute a "guaranteed benefit policy," because the insurer had investment discretion and the results of that investment discretion would determine the amount of funds available to the pension plan:

Print 1976). This provision was deleted and replaced by the more limited "guaranteed benefit policy" exemption. 29 U.S.C. § 1101(b)(2).

> The pension trustees did not buy an insurance contract with a fixed payout; they turned over the assets of the pension plan to [the insurance company] to manage with full investment discretion, subject only to a modest income guaranty. If the pension plan had hired an investment advisor and given him authority to buy and sell securities at his discretion for the plan's account, the advisor would be a fiduciary within the meaning of the act, and that is essentially what the Trustees did during the accumulation phase of the contract with [the insurance company].

698 F.2d at 327.

The principles articulated in *Peoria* have also been applied in the context of a contract nearly identical to GAC 50. *Jacobson v. John Hancock Mut. Life Ins. Co.*, 655 F.Supp. 1290, withdrawn pursuant to settlement, 662 F. Supp. 1103, 1112-13 (D. Conn. 1987). In *Jacobson*, the pension plan trustees alleged and the Court held that Hancock was an ERISA fiduciary with respect to funds held under a contract which were not associated with guaranteed benefits.

C. The District Court's Decision And The Third Circuit's Decision In *Mack Boring* Misconstrued The Statutory Language And Congressional Intent

The Third Circuit in *Mack Boring & Parts v. Meeker Sharkey Moffitt, Actuarial Consultants*, 930 F.2d 267 (3rd Cir. 1991),[6] adopted the decision of the District Court in this case. Like the District Court below, the Third Circuit essentially read the language "to the extent that" out of the definition of "guaranteed benefit policy." The Third Circuit thus effectively extended the exemption to the totality of *any* contract under which *any* benefits are guaranteed, even where the guaranteed

[6] The *Mack Boring* contract was a deposit administration contract, the same as the *Peoria* contract in all material respects. *Compare Peoria*, 698 F.2d at 322-23, *with Mack Boring*, 930 F.2d at 268-69.

aspect of the contract is dwarfed by its investment component.[7] Thus, *Mack Boring* in essence held that the term "guaranteed benefit policy" means "an insurance policy or contract that provides for benefits the amount of which is guaranteed by the insurer." 930 F.2d at 270-72 (citation omitted).

Congress understood, and the "to the extent that" language of the exemption makes clear, that there can be instances where a single contract can have exempt "guaranteed" aspects while at the same time having non-exempt aspects as to which the insurance company is an ERISA fiduciary. *See* ERISA Conf. Rep. at 5077. *Mack Boring* ignored the "to the extent that" limitation and placed ERISA's fiduciary protections on an "all or nothing basis" in direct conflict with the clear dictionary meaning of "to the extent that."

Mack Boring also ignored explicit language in 1101(b)(2) and the basic intention of Congress in enacting ERISA when it decided that the fluctuation resulting from an insurer's investment experience was irrelevant. The Third Circuit appears to believe that if a pension plan provides for defined benefits, and the employees' benefits are therefore fixed and secured (paid either by the employer, the Trust Fund or the insurer), the success or failure of the plan's investments is of no significance to the plan's beneficiaries. In other words, the Third Circuit appears to view ERISA as solely protecting the payment of benefits to Plan participants, and not protecting the Plan and Plan assets which ensure the payment of such benefits.

D. The Interpretation Argued By Hancock Violates Numerous Rules Of Statutory Construction

The interpretation of § 1101(b)(2) argued by Hancock fails to give effect to the words "to the extent that" in violation of

[7] As stated by the Second Circuit, "[the *Mack Boring*] court in effect exended the statutory exemption to the entirety of any contract under which any benefits are guaranteed, so that the exemption would apply regardless of the apportionment between the guaranteed component and the investment component of the contract." A-11.

well-recognized rules of statutory construction. This interpretation would create an exemption which has already been rejected by Congress. A blanket exemption for *all* general account contracts had been part of the Senate version of the draft legislation, but was deleted in Conference Committee and does not appear in the law as eventually enacted by Congress and signed by the President. *Compare* S.4, 93d Cong., 1st Sess. § 511 (1973), *reprinted in* 1 Legis. Hist. of ERISA at 170 (Comm. Print 1976) *with* 29 U.S.C. § 1101(b)(2)(B).[8] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be *presumed that the limitation was not intended*." *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (emphasis added) (citing *Arizona v. California*, 373 U.S. 546, 580-81 (1963)).[9]

Nevertheless, Petitioner relies, as it did in the courts below, on a "Staff Summary" to support its argument that Congress did not mean what it said when it stated in § 1101(b)(2)(B) that group annuity contracts were exempt from ERISA's fiduciary rules only "to the extent" they provide guaranteed benefits. Petition at 22-24.

[8] The Senate version of ERISA provided that the fiduciary provisions would not apply to "funds held by an insurance carrier unless that carrier holds funds in a separate account." The final version expanded coverage by exempting only "guaranteed benefit policies," and then only "to the extent that" such policies were "insurance contracts or policies" that provided for benefits which were "guaranteed" by the insurer. *Id.*

[9] The construction of the guaranteed benefit policy exemption advanced by Petitioner also violates the well-recognized canon of statutory construction that "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23, quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

In § 1101(b)(1), Congress explicitly exempted *all pension funds* invested in mutual funds. That section reaches "*any* security issued by an investment company registered under the Investment Company Act of 1940." By contrast, § 1101(b)(2)(B) is much narrower, demonstrating that, when Congress chose to, it knew how to draft a broad exemption, but *chose not to* in rejecting the Senate's version of the exemption and adopting § 1101(b)(2)(B).

Petitioner's argument is that, although (i) the House Bill was silent with respect to coverage of general account contracts, (ii) the Senate Bill specifically excluded all general account contracts, and (iii) the statute as enacted does not contain the words "general account" and exempts only "guaranteed benefit policies," this Court should interpret § 1101(b)(2)(B) as if it consisted of the deleted language of the Senate Bill. Hancock's sole basis for this argument is that a footnote in a "Staff Summary" stated that the policies of the House and Senate were the same with respect to general account contracts.[10]

This "Staff Summary" has absolutely no probative value in the construction of § 1101(b)(2)(B). Not only was it never endorsed or adopted by either House of Congress, it conflicts with the statute's language. "Not even formal reports, much less statements of individual committee members, can be resorted to for the purpose of construing a statute contrary to its plain terms." *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 308 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976)(citation omitted).

Statements not adopted or made by members of Congress or included in official House or Senate reports have little or no probative value. *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986). In *Kelly v. Robinson*, this Court declined to accord any significance to comments in a Bankruptcy Law Commission report where "none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports." *Id.* The "Staff Summary" that Hancock urges this Court to rely upon has far less probative value than the commission report that this Court declined to give any weight in *Kelly*.

The only rational reading of the legislative history is that, while the Senate intended to completely exempt general account assets and the House intended no such exemption, the Conference Committee compromised by taking the intermediate

[10] It is impossible to determine whether the "Staff" which prepared this "Summary" was from the House, the Senate, a subcommittee or a Committee. It is not even clear that the material was prepared by Congressional Staff.

position reflected in § 1101(b)(2)(B). Both the statutory language and logic dictate that § 1101(b)(2)(B) be interpreted consistent with this history.[11] Furthermore, Petitioner has never provided any explanation as to why the Senate language was dropped if the intention of Congress never wavered from the Senate's approach. Cf. *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

Petitioner also argues that the existence of state regulation of general accounts is evidence of Congress' intent not to regulate assets in such accounts. Petitioner argues, as it did in the courts below, that state insurance laws somehow pre-empt ERISA, despite the clear evidence discussed above demonstrating that Congress intended, by means of ERISA, to regulate insurance companies in connection with their handling of pension plan investment funds.[12] Indeed, petitioner goes so far as to argue that this Court, in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), applying the analysis in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), concluded that "when a state insurance regulation collides with ERISA, ERISA must give way to state regulation." Petition at 19.

Petitioner's reliance upon this Court's decisions in *Metropolitan Life* and *FMC Corp. v. Holliday* for this argument is misplaced. In *Metropolitan Life*, appellant Metropolitan Life was seeking, through reliance on ERISA's pre-emption provisions, to escape a Massachusetts insurance law provision which required minimum mental health benefits in all group health insurance policies for Massachusetts residents. This state law did

[11] Courts have long recognized that "statutes are frequently the product of compromise, and a legislative compromise would be undone if a court enforced the maximum position of one of the negotiating factions." *Harmon v. Teamsters*, 832 F.2d 976, 979 (7th Cir. 1987) citing *Rodriguez v. United States*, 480 U.S. 522 (1987). Hancock asks this Court to do exactly that, that is, enforce the Senate position, when the enacted language shows clear evidence of a compromise.

[12] Petitioner's argument on this point renders incomprehensible the decision by Congress to create a limited "safe harbor" for pension funds used to purchase a "guaranteed benefit contract." If Congress, as Petitioner claims, did not intend to regulate the "business of insurance" as it related to group annuity contracts, Congress' decision to include ERISA's limited "safe harbor" for certain types of insurance general account contracts makes no sense.

not conflict with any ERISA requirements; thus, this Court never faced the issue of conflicting provisions in *Metropolitan Life*.

This Court in *Metropolitan Life* merely held that Metropolitan Life and ERISA-covered plans which purchased group health policies from Metropolitan Life would be governed by *both* ERISA and the Massachusetts minimum benefit requirements. The Court concluded:

> We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. . . . We also are aware that appellants' construction of the statute would eliminate some of the disuniformities currently facing national plans that enter into local markets to purchase insurance. Such disuniformities, however, are the inevitable result of the congressional decision to "save" local insurance regulation. Arguments as to the wisdom of these policy choices must be directed at Congress.

Metropolitan Life, 471 U.S. at 747. Thus, while self-insured plans are subject only to ERISA, plans which purchase benefits from insurance companies are subject to *both* ERISA and state insurance law. *See* 29 U.S.C. § 144(b)(2).[13]

Indeed, this Court expressly rejected the argument that state insurance law might somehow preempt ERISA in a companion decision to *Metropolitan Life*, *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). In *Pilot Life*, this Court held that where a state law might arguably "regulate[] insurance" and would be "saved" from pre-emption under ERISA's savings clause but would also undermine a clearly expressed intention of Congress in enacting ERISA, the state law is pre-empted. 481 U.S. at 56-57. *See also*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

[13] The district court below readily dispatched this argument on this basis. See A-30 ("If a state statute meets the *Metropolitan Life* test, and thus fits ERISA's savings clause, the state law applies to the plan at issue. But ERISA applies to the plan as well").

Petitioner's reliance upon *FMC Corp. v. Holliday* is equally misplaced. In that case, this Court once again dealt with ERISA's "deemer" clause, concluding that Congress had intended "to exempt self-funded ERISA plans from state laws that 'regulat[e] insurance' within the meaning of [ERISA's] saving clause." This Court, however, certainly did *not* decide in *FMC Corp. v. Holliday* that insurance companies falling outside the scope of ERISA's "deemer" clause were exempt from ERISA. Indeed, countless courts have concluded, following this Court's *Pilot Life* decision, that ERISA's "saving" clause has no application where a state law provision conflicts with ERISA. *See, e.g., Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 764 (5th Cir. 1989).

In fact, there are numerous examples of instances in which insurance company practices are subject to dual regulation, and in which potential conflicts between the requirements of state law and ERISA are resolved by means of Prohibited Transaction Exemptions. For example, the extensive state laws and regulations governing separate accounts have not prevented insurance companies from complying with ERISA with respect to such accounts. *See e.g.*, N.Y. Ins. L. § 4240 (McKinney 1991); N.J.S.A. 17B:28-1 to 17B:28-15; 11 Codes, Rules and Regulations of the State of New York, Chapter III, Part 50 "Separate Accounts and Separate Account Annuities." Moreover, in the context of separate accounts, the insurance industry has made ample use of the administrative procedures that ERISA provides. *See, e.g.*, DOL Prohibited Transaction Exemption 81-82, 46 Fed. Reg. 46443 (1981); 88-92, 53 Fed. Reg. 38 (1988).

E. Regulatory Pronouncements Also Support A Finding That Hancock Is A Fiduciary

Petitioner argues that the Second Circuit's decision "conflicts with 18 years of consistent administrative pronouncements . . . by the Department of Labor." Petition at 3. Had the DOL taken such a position, it would have contradicted the statute. Moreover, DOL pronouncements do *not* support Petitioner's claim.

1. *DOL Interpretive Bulletins*

In the court below, Hancock argued that a DOL "Interpretive Bulletin Relating to Prohibited Transactions 75-2" ("IB 75-2") supported its position.[18] However, IB 75-2 is the DOL's interpretation of the scope of the *prohibited transaction* provisions of ERISA. 29 U.S.C. § 1106. If anything, IB 75-2(b) provides a "safe harbor" for certain contracts from ERISA's *prohibited transaction* provisions, not from the statute's central fiduciary responsibility provisions. *Compare* 29 U.S.C. § 1104 and §§ 1106, 1108. This point was well made in the *A.A.P.* district court opinion. *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 729 F. Supp. 1162, 1184-85 (N.D. Ill. 1989), *aff'd*, 941 F.2d 561, *reh'g and reh'g en banc denied*, 1991 US App. LEXIS 23027 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1182 (1992). There, the district court rejected the insurance company's reliance upon IB 75-2(b) as a complete exemption from ERISA. *See A.A.P.*, 729 F. Supp. at 1185. Similarly, the Second Circuit found that "[t]here is no inconsistency in considering certain assets to be plan assets for general fiduciary duty purposes but not for prohibited transaction purposes." A-13. *See also Jacobson v. John Hancock Mut. Life Ins. Co.*, 662 F. Supp. 1103, 1110 (D.Conn. 1987).

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[18] IB 75-2 reads in relevant part:

> (b) Contracts or policies of insurance. If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company, will not solely because the plan has been issued such a contract or policy of insurance be a prohibited transaction.

29 C.F.R. § 2509.75-2(b) (orig. publ. Feb. 6, 1975, republished without change to paragraph (b) on Nov. 13, 1986, 51 Fed. Reg. 41262, 41280). IB 75-2 has never been published for notice and comment pursuant to the Administrative Procedure Act's rulemaking provisions and thus does not have the force of law. *See* 5 U.S.C. § 553.

The Second Circuit and *A.A.P.* district court analysis is supported by the DOL. Discussing the differences between IB 75-2 and its final "Plan Asset Regulation," the DOL in 1986 stated that the Plan Asset Regulation was broader because it determined the reach of all of ERISA's fiduciary responsibility requirements, not just the prohibited transaction rules. Final Regulation Relating to the Definition of Plan Assets, 51 Fed. Reg. 41262 (No. 219) (Nov. 13, 1986).

2. *The "Plan Asset" Regulation*

The history of the "Plan Asset Regulation", 29 C.F.R. § 2510.3-101 ("PAR"),[15] also shows that the DOL does not view insurance company general accounts as exempt from the reach of ERISA. Although a proposed PAR would have given the insurance industry substantial relief because it governed not only prohibited transactions but also the issue of what constitutes a plan asset and thus who is a fiduciary under ERISA, 51 Fed. Reg. 41262 (No. 219) (Nov. 13, 1986), this proposal was withdrawn by the DOL in 1985 and no similar provision has ever been repromulgated by the DOL. In fact, in November 1986, the DOL adopted the final PAR without providing a "safe harbor" or, indeed, any "harbor" at all for insurance company general accounts. 29 C.F.R. § 2510.3-101 (1986).

3. *DOL Advisory Opinions*

There are other DOL rulings which support the conclusion that Hancock is a fiduciary with respect to funds not associated with guaranteed benefits. For example, the DOL has clearly employed the distinction between "guaranteed" and variable payments to plans to distinguish between funds which are plan assets and those which are not. The DOL has stated,

> [A] separate account would not hold "plan assets" for purposes of the fiduciary responsibility provisions of ERISA if it is maintained by an insurance company solely in connection with its fixed contractual obligations and if neither the ***amount payable to*** (or credited to) ***the plan*** or to any participant or beneficiary of the plan (including an annuitant) ***is affected in any way by the investment performance of the separate account***. . . . We note, however, that a conventional separate account (which holds contributions received from a plan and provides for the crediting of income on such amounts based upon the investment experience of the separate account) ***would not be considered to be maintained in connection with a fixed contractual obligation of the insurance company merely because assets of the separate account are ultimately applied to provide fixed annuities to participants***, and the assets of such a separate account would be considered to be plan assets.

[15] 29 C.F.R. § 2510.3-101 (final PAR discussed in detail and published at 51 Fed. Reg. 41262 (No. 219)(Nov. 13, 1986)).

DOL Advisory Opinion 83-51A (Sept. 21, 1983) (emphasis added).

As the Circuit Court below correctly recognized, by means of Advisory Opinion 83-51A, the DOL

> thus appears to take the position that "plan assets" for the purpose of the fiduciary responsibility provisions of ERISA do not lose their status as such merely because the ultimate use of the account may be to provide fixed annuities, where the plan assets are affected by investment performance.

A-12. Thus, the crucial distinction is whether the insurance company exercises *investment control* and whether the insurance company's investment performance affects the amount of funds available to the Plan and its participants.

Similar reasoning appears in Advisory Opinion 78-8A. There, the DOL stated that:

> The [Conference Report on section 1101(b)(2) of ERISA] evidences a congressional intent that when an insurance company provides investment advice which determines the rate of return to the plan and its participants, the assets in the account shall constitute plan assets so that the insurance company is subject to the fiduciary responsibility provisions of the Act.

DOL Advisory Opinion 78-8A (Mar. 13, 1978).

The distinction, therefore, raised by Hancock between general and separate accounts is irrelevant for identifying plan assets for purposes of § 1101(6)(2). As correctly stated by the Second Circuit: "The fact that all the assets of GAC 50 are held in Hancock's general account is not significant in view of Hancock's discretionary authority over the non-guaranteed phase of the contract." A-10,11. *See Jacobson*, 662 F. Supp. at 1109.

II.

HANCOCK CANNOT NOT ESCAPE ITS DUTIES UNDER ERISA BY RELIANCE ON A "PARADE OF HORRIBLES"

In its Petition, as it did below, Hancock argues that insurance company general accounts are exempt from ERISA simply because complying with ERISA would be a hardship. For example, in its Petition, Hancock argues that the Second Circuit's decision "has caused substantial confusion and uncertainty in the insurance industry and threatens disruption of longstanding insurance company business practices." Petition at 3. As this Court stated recently, "[W]e decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it." *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

Similarly, the Second Circuit was told repeatedly that if Hancock is deemed a fiduciary "absurd and unmanageable

consequences" with "extreme implications" would follow. The fact that Hancock would have to comply with the "prudent man" rule is neither absurd nor extreme. The only consequence of the decision below would be to force Hancock to bring its conduct into compliance with ERISA's fiduciary provisions.

Moreover, since 1975, neither Hancock nor the insurance industry attempted to bring general accounts into compliance with ERISA. As aptly stated in *Jacobson*:

> An insurer may not use a general account to harbor a plan's assets, create a potential for conflict and thus claim relief from a fiduciary's obligations. Rather, so long as the funds from a plan are not converted to a fixed, guaranteed obligation but remain subject to fluctuation resulting from the insurer's investment performance, the funds are plan assets for which the insurer must be held accountable as a fiduciary.

Jacobson v. Hancock Mut. Life Ins. Co., 655 F. Supp. 1290, 1299 (D.Conn. 1987).

Hancock also ignores the fact that the insurance industry was not alone in conducting elements of its business in a manner which was made unlawful by ERISA. Numerous industries had to radically change the way they handled pension funds as a result of the enormous upheaval created by ERISA. The only difference between the insurance industry and these other industries was that the insurance industry chose not to comply with the statute with respect to its general account contracts.

Hancock claims that the legislative history of ERISA is devoid of any indication that Congress intended to subject insurance company practices to ERISA. In its Petition to this Court, Hancock goes so far as to argue that the Second Circuit's decision violated "the national policy underlying the McCarran-Ferguson Act." Petition at 11. This reference echoes an argument advanced by Petitioner in the courts below, that the McCarran-Ferguson Act preempted ERISA. The legislative history, however, clearly demonstrates that Congress was fully aware that ERISA's fiduciary responsibility provisions would have a substantial

impact upon until-then accepted practices in the *insurance*, banking and securities industries:

> The Committee is aware that there exist various established and recognized practices which are accepted in commercial banking, trust and *insurance companies*, investment companies and other advisors in connection with employee benefit plans. However, notwithstanding current acceptance of such practices, the Subcommittee has found it difficult to establish definitive criteria concerning those practices which should be specifically proscribed. This difficulty was weighed . . . against the overriding need to protect workers' pension funds, and [the Committee] concluded that the latter's interest out-weighed any current attempt to define all practices and relationships which constitute not only actual but real potential threats to the security and preservation of the pension funds.

S. Rep. No. 93-127, 93d Cong. 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4868 (emphasis added).

In order to ameliorate this problem, ERISA contains long transition periods and administrative procedures under which affected parties can obtain relief. See 29 U.S.C. §§ 1108, 1114.

> [T]he Secretary of Labor, is authorized by the Act to waive any proscribed practice as long as it is consistent with the purposes of the Act and determined to be in the interests of pension plan participants. The Committee is not unaware of the possible impact of these prohibitions, and accordingly has made provision in the bill for an adequate transition period of 3 years, or longer, if warranted.

S. Rep. No. 93-127 (emphasis added); *see also* ERISA Conf. Rep., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038,

5089-90 ("The conferees recognize that some transactions which are prohibited . . . nevertheless should be allowed in order not to disrupt the established business practices of financial institutions . . . consistent with adequate safeguards to protect employee benefit "plans").[16] Notwithstanding this provision, Hancock and the insurance industry have focused their efforts on avoiding any application of ERISA to general accounts, and have not sought administrative relief aimed at enabling them to meet ERISA's requirements without the "drastic" consequences they predict.[17]

[16] These portions of the legislative history also demonstrate that the Third Circuit was incorrect in stating that Congress did not make it clear that it understood the disruptions that ERISA would cause to insurance practices. See *Mack Boring & Parts v. Meeker Sharkey Moffitt, Actuarial Consultants*, 930 F.2d 267, 275 n.17 (3d Cir. 1991). To paraphrase this Court, with respect to ERISA's impact, Congress barked. *Chisom v. Roemer*, 111 S. Ct. 2354, 2364 n.23 (1991).

[17] For example, a leading treatise in the field makes clear that segmentation in general accounts is available to provide the administrative tracking and accountability already available to trusts and separate accounts:

> By [segmentation], the insurer can allocate general account assets to various lines of business or to defined classes of contract holders by merely setting up and maintaining *memorandum* accounts. The segmentation must be carried out and maintained on an equitable and consistent basis. . . .
>
> Segmentation is a powerful and flexible tool for asset management and allocation of investment earnings. It permits the matching of assets and liabilities in a way not possible under other approaches. Assets can be segmented in ways to meet the differing investment objectives of various groups of contract holders.

McGill & Grubbs, *Fundamentals of Private Pensions* at 502 (6th ed. 1989).

III.

BECAUSE THE CIRCUIT COURT WAS CLEARLY CORRECT, AND THERE HAS NOT BEEN SUFFICIENT DEVELOPMENT OF THE LAW IN OTHER CIRCUITS, CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

As demonstrated above, the Circuit Court was clearly correct when it concluded that the "free funds" under GAC 50 are plan assets as to which Hancock is an ERISA fiduciary. Although the ruling below conflicts with the Third Circuit's decision in *Mack Boring*, there are compelling grounds for denying Hancock's petition.

First, although there is a conflict between the Second and Seventh Circuits, on the one hand, and the Third Circuit, on the other hand, this conflict will not result in the imposition of inconsistent duties on petitioner or other similarly situated insurance companies. While the Second Circuit's decision requires petitioner to treat "free funds" under GAC 50 as plan assets as to which it is a fiduciary, the Third Circuit, in *Mack Boring*, did not prohibit such treatment of "free funds." Thus, there are no inconsistent obligations on the insurance company and no great urgency in deciding this issue and resolving the conflict between a limited number of circuit courts.

Second, this is a case in which further development of the law in other circuit courts may permit a majority view to emerge, thereby clarifying the issues for review. Moreover, declining certiorari review in the case at bar may permit the Third Circuit to reconsider its own view in light of the reversal of the district court by the Second Circuit — the chief authority upon which the Third Circuit relied in *Mack Boring*. *Cf.* Stern, Grossman & Shapiro, *Supreme Court Practice*, at 199 n.30 (6th ed. 1986).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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